BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN W. IVEY	)	
Claimant	)	
	)	
VS.	)	
	)	
RUBBERMAID SPECIALITY PRODUCTS	)	
Respondent	)	Docket No. 1,008,848
Self-Insured	)	

ORDER

Claimant requests review of the September 16, 2003 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proving he suffered a work-related injury on November 28, 2002. Accordingly, all benefits were denied.

Claimant requests review of this decision, alleging the ALJ erred in finding that claimant failed to sustain his burden of proof. Claimant argues that the evidence established he sustained a compensable injury on November 28, 2002, which entitles him to benefits under the Kansas Workers Compensation Act (Act).[1] As such, claimant requests the Appeals Board (Board) grant his request for workers' compensation benefits for the alleged injury to his knee.

The only issue before the Board on this appeal is whether claimant sustained a work-related accidental injury while working for respondent on November 28, 2002.[2]

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[1] K.S.A. 44-501, et seq.

[2] Claimant's brief to the Board contains four pages of argument addressing the issue of notice pursuant to K.S.A. 44-520. However, the ALJ's Order makes no mention of notice nor did he need to address that issue. The ALJ denied claimant's request because claimant failed to establish a work-related injury on November 28, 2002. Thus, notice is irrelevant. Likewise, it is irrelevant for purposes of this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and after considering the parties' arguments, the Board concludes the ALJ's decision must be affirmed.

Claimant alleges he injured his right knee when, on November 28, 2002, he stepped off a pallet while performing his regular work duties. According to claimant, he went directly to Becky Johnston, a "lead person", and told her of his injury on that same day. Claimant admits he did not return to work, as scheduled, until December 17, 2002. He indicates he called in on several days, advising the person on the phone he had injured himself on November 28, 2002, and was unable to work. Claimant testified that he spoke with his direct supervisor, Ron Collins, on December 2 and 3, 2002, and to an unnamed woman on the other dates he called in. He was unable to provide any other identifying information with respect to the woman he spoke to other than the belief that she was caucasian. Claimant made a list of the dates he alleges he called, but he produced no other independent corroborative evidence to substantiate these calls.

Mr. Collins and Karen Hedrick were both direct supervisors on the team to which claimant was assigned. Both Mr. Collins and Ms. Hedrick deny claimant called either of them prior to December 16, 2002, regarding an injury and explaining his absences. Each day claimant was a "no call/no show", Ms. Hedrick documented his absence in the computer. After five absences, she completed the paperwork necessary to terminate claimant's employment. Before that paperwork could be processed, claimant called in on December 16, 2002, and spoke to Mr. Collins. Claimant indicated he had been to a physician, but was now released and would be reporting to work on December 17, 2002.

Mr. Collins and Ms. Hedrick concluded claimant could report to work, but that Human Resources personnel would need to talk to him given their impression that he had abandoned his job by failing to appear or call in with any sort of explanation. According to both of these supervisors, claimant never disclosed a work-related injury during this conversation on December 16, 2002. In fact, Mr. Collins specifically asked claimant if the injury was work related, and claimant denied this. Claimant maintains he was afraid of losing his job and compromising the incentive program respondent implemented which rewards the team members when there are no compensable injuries during any given month.

When claimant returned to work, he was directed to produce documentation regarding his medical treatment and to provide some sort of evidence reflecting long distance calls to respondent's facility after November 28 and before December 16, 2002. Other than claimant's own written recollection, no documentation was provided as claimant maintains he used a phone card and has no other documentation that would evidence the calls.

Medical records were provided, but they indicate claimant sustained his injury in a manner different than he presently alleges. On December 5, 2002, claimant sought treatment from an emergency room in Arkansas City, Kansas. These medical records indicate claimant was experiencing right knee pain and swelling "since last Thurs. a.m." It further indicates claimant "denies injury." There are additional medical records from the Ark City Clinic, both dated December 17, 2002, which indicate claimant twisted his knee at home.[3] One of these documents even references the accident occurring on Thanksgiving Day.[4]

The Act limits the Board's jurisdiction to review preliminary hearing findings. Consequently, at this juncture, not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.[5] Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

(1) Did the worker sustain an accidental injury?

(2) Did the injury arise out of and in the course of employment?

(3) Did the worker provide the employer with timely notice and with timely written claim?

(4) Do certain other defenses apply?

The Board has jurisdiction to consider the sole issue presented in this appeal, specifically whether claimant sustained an accidental injury arising out of and in the course of his employment with respondent on November 28, 2002. After considering the substantial record, the Board is not willing to disturb the ALJ's finding in this matter and, in fact, finds his determination to be well founded.

There is ample evidence upon which one could conclude that claimant's right knee injury occurred at home. The medical records generated in December 2002 all consistently describe a non-work-related injury that occurred at home. Claimant rationalizes this inconsistency by alleging he was afraid of losing his job due to his injury (and the potential for a workers' compensation claim) and that as a result, he lied to the health care providers. This explanation makes no sense, as claimant has adamantly maintained that

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[3] Redmond Depo., Ex. 6; P.H. Trans., Resp. Ex. 3.

[4] P.H. Trans., Resp. Ex. 3.

[5] K.S.A. 2002 Supp. 44-551(b)(2)(A).

he told Becky, a woman he perceived as a supervisor, of his injury on November 28, 2002, immediately after it happened. Moreover, he alleges he called in to Mr. Collins and told him of the accident and resulting injury on December 2, 2002. If he had done these things, there was no reason to mislead the health care providers. For this reason, the Board finds the ALJ's determination that claimant failed to satisfy his burden of proof should be affirmed.

As provided by the Act, preliminary hearing findings are not binding, but subject to modification upon a full hearing on the claim.[6]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated September 16, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2003.

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
David S. Wooding, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[6] K.S.A. 44-534a(a)(2).